United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1770

9-23

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-1770

Bols

UNITED STATES OF AMERICA,

Appellee

V.

WILLIE JEMISON, JR.,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

APPELLANT'S REPLY BRIEF

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REPLY TO GOVERNMENT'S POINT II:

THE COURT'S FAILURE TO CHARGE THE JURY THAT IT COULD FIND THE DEFENDANT GUILTY OF SIMPLE POSSESSION OF COCAINE

The appellant agrees with the Government that the test for determining whether a lesser included offense charge is required is the one set down in Sansone v. United States, 380 U.S. 343 (1965).

In United States v. Harary, 457 F.2d 471, 478 (2d Cir. 1972) a panel for this Circuit held that "In appropriate cases...the defense may avail itself of the rule [Rule 31 of the Federal Rules of Criminal Procedure] that a defendant may be found guilty of an offense necessarily included in the offense charged.

The question in this case is the same as in Harary, whether the evidence adduced at trial presented the disputed factual element required by Sansone. In Harary the defendant had requested that the lesser offense charge be withheld from the jury's consideration because there was no conflict between the offense charged and the lesser offense[1/]. The appellant Jemison, on the other hand, requested the trial court to charge the jury that it could

find him innocent of the sale of cocaine but guilty of simple possession based on the fact that the jury could find that he illegally possessed the cocaine but that he was entrapped as to the sale.

The Government misinterprets the essence of entrapment in its brief. The Defendant admitted two of the essential elements of the offense: 1) that the substance involved in the sale or transaction was cocaine; and 2) that he did, in fact, sell the cocaine. The third element of the offense[2/] is that the Defendant knowingly and intentionally carried out the acts of selling the cocaine. In that the Defendant's defense was entrapment, the third element was not admitted.

Jemison claimed that he was not ready and waiting for the opportunity to sell the cocaine. It was his defense that the Government agent or informant (Yat or Mr. Yarde) initiated the commission of the sale and were it not for his insistence Jemison would not have committed the crime. Also included in Jemison's entrapment defense was his claim that he habitually used cocaine to such an extent as to make him vulnerable to entrapment (See Appendix 1-8)

The disputed factual elements necessary for the sale of cocaine that are not required for the lesser charge of simple possession are 1) that the defendant possessed the cocaine with the intent to distribute, and 2) that the defendant did, in fact, sell the cocaine. As stated previously the defendant did not dispute the latter element. It should also be noted that Jemison did not claim that the Government either supplied him with the cocaine or entrapped him into possessing the cocaine he was charged with selling on two occasions. As an admitted user Jemison possessed the drugs to support his habit, and therefore Jemison could not argue that the government produced his predisposition to possess the drugs.

The factual issues that would have been presented to the jury by charging the jury on the lesser included offense as well as the sale of cocaine would not have been the same. Unlike the facts in Harary and in State v. Markis, 352 F.2d 860 (2d Cir. 1965), vacated on other grounds 387 U.S. 425 (1967), two cases that are similar and partially on point, the facts in this case were controverted. Jemison contended that he was a heavy drug user who was entrapped into selling the cocaine, while the

Government based its case on the fact that Jemison was a professional drug dealer. (App. at 9-11)

The disputed facts between the offense of sale of cocaine and simple possession should have been given to the jury to resolve. In requesting the lesser charge the defendant was not attempting to give the jury an "easy way out" but the opportunity to exercise its legitimate function.

Respectfully submitted,

The Defendant/Appellant
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CERTIFICATION

This is to certify that a copy of Appellant's Reply Brief was mailed, postage prepaid, to Michael Hartmere, Esq., United States Attorney's Office, Bridgeport, Connecticut.

Charles N Sturtevant
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FOOTNOTES

1/

See the recent opinion in United States v. Brewster, 15 Cr.L. 2466 (D.C. Cir. 1974) where the Court held differently from United States v. Harary, 457 F.2d 471 (2d Cir. 1972), by finding that the crime of accepting an illegal gratuity, under 18 U.S.C. §201 (a) is a lesser included offense of bribery, 18 U.S.C. §201(c)(1).

2/

The elements are the same for both counts as they both allege the sale of cocaine and the same violation, but different dates.